

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**





76-2075

To be argued by:

LAWRENCE STERN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES ex rel. DAVID MITCHELL,

Petitioner-Appellant,

-against-

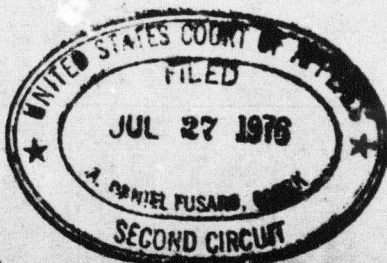
J.E. LaVALLEE, Superintendent,  
Clinton Correctional Facility,

Respondent.  
-----X

B  
P/S

ON APPEAL FROM ORDERS  
OF THE UNITED STATES  
DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF  
NEW YORK

BRIEF AND APPENDIX FOR PETITIONER-APPELLANT



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## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CASES	1
ISSUES PRESENTED	1
STATEMENT PURSUANT TO RULE 28 (a) (3)	
A. Preliminary Statement	2
B. Statement of Facts	
1. The Exhaustion of State Remedies and the Propriety of the Hearing Grant Despite a Prior Application	3
2. The Habeas Hearing	8
3. The Wade Hearing and the Trial	14
ARGUMENT	
POINT I: APPELLANT WAS DEPRIVED OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND A SUBSTANTIAL DEFENSE, WHEN HIS COUNSEL, ASSIGNED TO HIM OVER HIS IGNORED PROTESTS PRIOR TO TRIAL, DID NOT DISCUSS THE CASE WITH HIM, DID NOT INVESTIGATE HIS DEFENSE OR THE WITNESS IN SUPPORT THEREOF, DEROGATED THE DEFENSE IN FRONT OF THE JURY, AND ERRONEOUSLY IMPEDED HIS RIGHT TO TESTIFY.	20
CONCLUSION	41
APPENDIX	
Docket Entries	A
Opinions of the Court Below	B



# T A B L E   O F   C A S E S

	<u>Page</u>
<u>Allen v. Moore</u> , 453 F. 2d 970 (1st Cir., 1972) cert. den. 406 U.S. 969	36
<u>Alvarez v. Wainwright</u> , 18 Cr. L. 2141 (5th Cir., 1975)	24
<u>Braithwaite v. Manson</u> , 18 Cr. L. 2290 (2d Cir., 11/20/75)	35
<u>Cameron v. Fastoff</u> , Docket No. 75-2073 (2d Cir., 4/22/76)	6
<u>Chapman v. California</u> , 386 U.S. 18 (1967)	21
<u>Ferranto v. United States</u> , Docket No. 74-1366 (2d Cir., 10/31/74)	7
<u>Fitzgerald v. Estelle</u> , 505 F. 2d 1334 (5th Cir., 1974)	24
<u>Foster v. California</u> , 344 U.S. 440 (1969)	35
<u>Griffin v. California</u> , 380 U.S. 609 (1965)	33
<u>Hobbs v. Peppersack</u> , 301 F. 2d 875 (4th Cir., 1962)	7
<u>King v. Beto</u> , 429 F. 2d 221 (5th Cir., 1970)	34
<u>Michelson v. United States</u> , 335 U.S. 469	38
<u>Picard v. Connor</u> , 404 U.S. 270 (1971)	5
<u>People v. Chestnut</u> , 42 A.D. 2d 594 (2d Dept., 1973)	39
<u>People v. Jacobs</u> , 45 A.D. 2d 675 (1st Dept., 1974)	39
<u>People v. Jackson</u> , 50 A.D. 2d 905 (2d Dept., 1975)	40
<u>People v. Johnson</u> , 31 A.D. 2d 842 (2d Dept., 1969)	39
<u>People v. Luckman</u> , 354 App. Div. 694 (2d Dept., 1938)	41
<u>People v. McKinley</u> , 39 A.D. 2d 749 (2d Dept., 1972)	41
<u>People v. Molineaux</u> , 168 N.Y. 264	39
<u>People v. Moore</u> , 20 A.D. 2d 817 (2d Dept., 1964)	39,40
<u>People v. Reingold</u> , 44 A.D. 2d 191 (4th Dept., 1974)	39
<u>People v. Santiago</u> , 15 N.Y. 2d 640 (1964)	41
<u>People v. Thomas</u> , 43 A.D. 2d 547 (1st Dept., 1973)	39



	<u>Page</u>
<u>People v. Washington</u> , 32 A.D. 2d 605 (4th Dept., 1969)	39
<u>People v. Whitmoyer</u> , 24 A.D. 2d 611 (2d Dept., 1965)	41
<u>Sanders v. United States</u> , 373 U.S. 1 (1963)	7
<u>Stovall v. Denno</u> , 388 U.S. 293 (1967)	36
<u>Tucker v. United States</u> , 427 F. 2d 615 (D.C. Cir., 1970)	8
<u>United States ex rel. King v. Schubert</u> , 522 F. 2d 527 (2d Cir., 1975)	34
<u>United States ex rel. Leeson v. Damon</u> , 496 F. 2d 718 (2d Cir., 1974)	7
<u>United States ex rel. Lewis v. Henderson</u> , Docket No. 74-2655 (2d Cir., June 4, 1975)	7
<u>United States ex rel. Testamark v. Vincent</u> , 496 F. 2d 641 (2d Cir., 1974) cert. den. 421 U.S. 951 (1975)	25, 26, 34
<u>United States ex rel. Thomas v. Zelker</u> , 332 F. Supp. 595 (S.D.N.Y. 1971)	21, 34, 36
<u>United States v. Ash</u> , 413 U.S. 300 (1973)	35
<u>United States v. Bozza</u> , 365 F. 2d 206 (2d Cir., 1966)	22
<u>United States v. Branker</u> , 395 F. 2d 881 (2d Cir., 1968)	21
<u>United States v. Calabro</u> , 467 F. 2d 973 (2d Cir., 1973)	23
<u>United States v. Cook</u> , 464 F. 2d 251 (8th Cir., 1972) cert. den. 409 U.S. 1011	35
<u>United States v. Dailey</u> , 18 Cr.L. 2166 (8th Cir., 10/22/75)	35, 36
<u>United States v. Devins</u> , Docket No. 76-1007 (2d Cir., 5/12/76)	27
<u>United States v. Fernandez</u> , 456 F. 2d 638 (2d Cir., 1972)	35
<u>United States v. Jackson</u> , 390 U.S. 570 (1968)	33
<u>United States v. Johnson</u> , 461 F. 2d 1165 (5th Cir., 1972)	36
<u>United States v. Luck</u> , 447 F. 2d 1333 (6th Cir., 1971)	36
<u>United States v. Morrissey</u> , 461 F. 2d 666 (2d Cir., 1972)	23
<u>United States v. O'Neal</u> , 496 F. 2d 368 (6th Cir., 1974)	35
<u>United States v. Stevenson</u> , 409 F. 2d 354 (7th Cir., 1969)	22
<u>United States v. Vaught</u> , 485 F. 2d 320 (4th Cir., 1973)	21
<u>Federal Habeas Corpus: Post Conviction Remedy for State</u> <u>Prisoners</u> , 108 U.S. 125, 126 (1882) Rev. 461, 520 (1960)	8



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES ex rel. DAVID  
MITCHELL,

Petitioner/Appellant,

-against-

J.E. LaVALLEE, Superintendent,  
Clinton Correctional Facility,

Respondent.  
-----x

ISSUE PRESENTED

1. Whether appellant was deprived of his Fifth, Sixth, and Fourteenth Amendment rights to a fair trial, due process of law, effective assistance of counsel, and a substantial defense, when his counsel, assigned to him over his ignored protests prior to trial, did not discuss the case with him, did not investigate his defense or the witness in support thereof, derogated the defense in front of the jury, and erroneously impeded his right to testify.



STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from orders of the United States District Court for the Southern District of New York (Stewart, J.) entered on June 23, 1976, denying, after a hearing, appellant's application for a writ of habeas corpus, and on July 16, 1976 denying motion for reargument. The District Court granted a certificate of probable cause to appeal to this Court; timely notice of appeal has been filed, and Lawrence Stern, Esq. assigned to represent petitioner below, continues as assigned counsel on this appeal pursuant to the Rules of the Court.

B. Statement of Facts

By these proceedings appellant seeks to have vacated a judgment rendered against him in the Supreme Court of the State of New York County of New York (Postel, J.) on November 26, 1969, convicting him, after trial by jury, of robbery in the first degree, grand larceny in the third degree, burglary in the second degree and possession of a weapon and sentencing him to a total term of imprisonment of 16 years 8 months to 50 years. Appellant also received an additional concurrent one year sentence on a conviction for criminal trespass; the District Court below has vacated that conviction.



The Appellate Division of the State of New York, First Department, affirmed the judgment of conviction without opinion on February 1, 1971 (36 A.D. 2d 690) and leave to appeal to the Court of Appeals was denied on April 2, 1971. In that same year appellant pro se petitioned the District Court for habeas corpus relief and on July 15, 1971, the petition was summarily denied without a hearing. This Court affirmed in January, 1973, and certiorari was denied in May, 1973.

On November 7, 1973, appellant, again pro se, filed a second application for habeas corpus relief.

1. The Exhaustion of State Remedies and the Propriety of the Hearing Grant despite a Prior Application

In December, 1973, the Attorney General replied to appellant's second petition, opposing it on the merits and conceding the exhaustion of state remedies. On January 13, 1976, the District Court, in an interlocutory memorandum held that appellant had exhausted his state remedies with respect to his claim of ineffective assistance of counsel and ordered a hearing of that issue.\*

A review of the brief submitted on behalf of petitioner to the Appellate Division, First Department, in October of 1970 reveals that Mitchell raised due process claims in the state court.... (opinion of 1/13/76 at p. 3)... While Mitchell's claim was phrased in terms of denial of due process because counsel was reassigned to him over his objections (a claim also raised in Mitchell's habeas corpus petition of 1971), Mitchell also argued in his appellate brief that he was denied the effective assistance of counsel due to the inadequate preparation of his attorney [Brief, p. 20]. Further, he argued the

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\* The Court also held that appellant had not exhausted his Eighth Amendment cruel and unusual punishment claim, and it held that there was no merit to his due process claim that the trial judge was prejudiced and despotic.



denial of due process because the conduct of the trial judge allegedly deprived Mitchell of a fair trial [Brief, p. 21] (id. at p. 3, n. 1).

A hearing having been ordered, the Court assigned counsel to represent appellant for that purpose. The Attorney General moved on March 16, 1976, for reargument, retracting and reversing his prior position that appellant had exhausted state remedies and also asking that appellant's prior application bar consideration of the instant one and also asserting that appellant had alleged insufficient grounds for habeas corpus relief.

Appellant replied to the motion for reargument and replies herein to the same effect should respondent raise these issues before this Court.

The record of appellant's state trial and appeal shows that in both instances appellant attempted to bring before the Courts of the State the inadequacy of his counsel's representation. At pre-trial proceedings on October 16 and 17, 1969, and during the trial, appellant repeatedly sought to explain to the trial judge the reasons for his wanting the discharge of the Court appointed Mr. Molofsky, and just as repeatedly he was told, without consideration to appellant's reasons, that no new counsel would be assigned, and that if he persisted in attempting to explain his reasons to the Court he would be bound, gagged and straghtjacketed, which he was (See minutes of October 16 at pp. 23,26,27,28,30,32; October 17 at pp. 37-42; remaining minutes of trial at pp. 51-59). Before being bound and gagged and during it, when the Court permitted him to speak briefly, appellant was able to say that he required certain information and couldn't proceed with the picking of a jury until he knew about the case (id. at 23), that he



had certain written motions to make pro se with respect to his counsel (Id. at 27-29), that, "He is doing nothing for me" (Id. at 40), that counsel knew nothing about the case and that in two brief interviews with counsel, counsel spoke little about the case (Id. at 52), and that counsel whom he didn't want should not be forced on him (Id. at 54). The trial Court's response to all this was that no pro se motions would be received from appellant (28), that Molofsky would be directed to conduct the defense in any "manner you [Molofsky] see fit and proper" (30), that "Molofsky is assigned -- period" (27), and that "If you [appellant] open your mouth again you are going to be bound and gagged. Mr. Molofsky is a very capable and proper attorney" (39), and, finally, the actual binding, gagging and straightjacketing of appellant to which his trial counsel took no objection (42).

Thus, appellant made every attempt to have the Courts of New York State pass on his claim that his assigned counsel was not prepared and was not adequately representing him, but at trial, and then on appeal, where it was raised in the brief on the basis of the aborted record permitted by the trial court, the Courts of New York have disregarded his claim. Picard v. Connor, 404 U.S. 270, 275, 278 (1971), requires for exhaustion purposes that "the substance of a federal habeas corpus claim must first be presented to the state courts...; that the claim be 'fairly presented.'" The substance of the claim was presented, i.e. deprivation of adequate representation, the failure of counsel to prepare and to investigate appellant's case, and any unfairness in its presentation cannot be charged to appellant, because the record reveals he made every effort to present it fully but was



thwarted by the Courts who did not hear him out. Furthermore, no further State corrective process is available to appellant under New York State Criminal Procedure Law § 440.10 (2)(a), since,

The ground or issue raised upon the motion  
[for collateral relief] was previously determined  
upon the merits upon an appeal from the judgment.\*

If the Appellate Courts of New York State had thought the procedures of the trial court in imposing Mr. Molofsky on appellant without full inquiry to be deficient, then they had the choice of upholding appellant's claim and reversing the judgment on the merits of the claim or of remanding for further hearings on the subject.\*\* Their affirmance indicates both that the procedures surrounding the counsel claim were finally determined to be adequate under New York State law and that there was no merit, under State and Constitutional law (as interpreted by the State) to appellant's deprivation of counsel claim. Thus, appellant is now precluded from arguing in the State that his specific material witness claim should be adjudicated by them. Under these circumstances, the plain meaning of 28 U.S.C. §2254(b) applies to permit this Court to reach the merits of this petition because,

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\* It is all too certain that should appellant be sent back to the state courts to seek coram nobis on this issue, the District Attorney's first line of preclusionary argument would be the invocation of this section and of §440.10(2)(c) for the proposition that either the claim was raised already or that, if not, appellant's failure to raise it has waived the claim. Despite the State's argument to this Court, accepted by it in Cameron v. Fastoff, Docket No. 75-2073 (decided 4/2/76), that C.P.L. § 440.10 (2)(c) did not preclude post conviction relief for Constitutional deprivations, when petitioners in that case filed such a motion in the Supreme Court of the State of New York, the State argued in reverse that C.P.L. §440.10(2)(c) did preclude post conviction relief. See opposition affirmation of ADA Barry A. Schwartz, dated June 14, 1976 in People v. Cameron et al., Supreme Court, Queens County, Index Nos. 2115 and 2116/71.

\*\* "On review the Appellate Division has the duty of reviewing the appellate record in determining whether errors had been preserved so as to  
(footnote continued, p. 7)



"it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." See also United States ex rel. Leeson v. Damon, 496 F. 2d 718, 720-721 (2d Cir., 1974).

Finally, in Sanders v. United States, 373 U.S. 1 (1963), the Supreme Court determined that an application for federal habeas corpus can be barred because of a prior application for such relief only if the prior determination was on the merits and the ends of justice would not be served by reaching the merits of the subsequent application. The Sanders decision referred to the case of Hobbs v. Peppersack, 301 F. 2d 875 (4th Cir., 1962) in discussing prior adjudications on the merits. In Hobbs, the petitioner's previous denials were held not to be on the merits because the previous courts (301 F. 2d at 876, n. 3) "... did not discuss his contention and summarily denied relief" without conducting an evidentiary hearing. See also United States ex rel. Lewis v. Henderson, Docket No. 74-2655 (2d Cir., June 4, 1975) slip op. 3955, 3969. In this context it should also be noted that the prior application to Judge Groake was made without benefit of counsel. The issues were brought to the court's attention in a pro se petition composed by an inmate with no legal training and were perhaps not presented "as clear as a mountain lake in springtime." Ferranto v. United States, Docket No. 74-1366 (2d Cir., October 31,

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(footnote continued from p. 6)

warrant reversal 'upon the facts' or 'in the interest of justice.' See NYCPL §470.15, and the question was raised in the brief there." United States ex rel. Leeson v. Damon, 496 F. 2d 718, 720-721 (2d Cir., 1974).



1974) slip op. at 196. Appellant's inability to raise these complex issues properly should not be held against him. "The point is only that if the prior application was disposed of without the appointment of counsel, a subsequent application must be considered on its own merits and not summarily disposed of on the bases of the previous denials." Tucker v. United States, 427 F. 2d 615, 617-618 n. 13 (D.C. Cir., 1970). Considering both the magnitude of the constitutional defects and the inadequate treatment accorded the prior pro se application, a compelling situation for applying the "ends of justice" discretion also confronts this Court. See Reitz, Federal Habeas Corpus: Post Conviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461, 520 (1960).

The respondent's motion for reargument was denied and the hearing proceeded.

#### A. The Habeas Hearing

Emanuel Molofsky testified that he was a member of the bar, that he has tried criminal cases, and that he "believes" he represented David Mitchell although he did not recall him and assumed that the man who sat next to his attorney at the hearing was Mr. Mitchell (3-6). He "glanced" at the minutes of the case "to get an idea of what the case was about" (11) but he didn't recall whether or not appellant gave him the names of witnesses (12-13). Since 1969, he has tried 6 federal cases, 25-30 State felony trials, and countless misdemeanors, an average of 6 major trials a year in addition to the "countless numbers of misdemeanors" (12), and in each case it was his practice to personally "go out" after any witness given to him (9, 11).



David Mitchell, the appellant herein, is incarcerated at Taconic Correctional Facility in Bedford Hills, a minimum security institution, pursuant to a sentence totalling some 50 years. While in prison he has completed high school, earned a certificate in drafting, and taken courses in welding, music theory, and electrical maintenance (36). He is 31 years old, a native of Trinidad who travelled to the United States in 1967 as a merchant seaman (15-16). While here in the year prior to his arrest, he married and obtained various night jobs while awaiting to ship out on assignment from the National Maritime Union of which he was a member (16-18, 25). In July, 1968, he was working nights at Drake's bakery on Clinton Avenue in Brooklyn, and reporting to the Union Hall, 13th Street and Seventh Avenue, every weekday to get a ship assignment (17-18, 34-35).

Mr. Mitchell was arrested on July 22, 1968, and has been in jail ever since. On July 21, 1968, the day before his arrest, he reported to the Union Hall in the morning and left there at about 2:30 P.M. On the street near the Hall he ran into a fellow West Indian, a hustler (odd-jobber) around the docks in Jamaica, named Kenny Burrell. Mr. Mitchell was happy to see a fellow countryman, and the two went to a bar. After a few drinks, Burrell gave Mr. Mitchell his address on a piece of paper and offered to give Mr. Mitchell some marijuana that he had stashed at home. The address he gave Mr. Mitchell was 157 Christopher Street. They left the bar, smoked a joint on the street and agreed that Mr. Mitchell would come to 157 Christopher Street the following day to pick up some marijuana, and then Mr. Mitchell went home to his wife at 257 Stuyvesant Avenue (19022, 35).

On July 22, 1968, the day of his arrest, Mr. Mitchell left the Union Hall and walked to 157 Christopher which was in the vicinity.



He rang the bells at the front door, and a woman came to an upstairs window and asked him what he wanted. He said he was looking for Kenny Burrell. The woman left the window; the buzzer sounded and the downstairs door opened. As he was mounting the stairs, the woman asked what he wanted with Kenny. Mr. Mitchell showed the slip of paper, said he was a friend of Kenny's and Kenny had given him this address to look him up. The woman told him to wait a minute and closed the door. When Mr. Mitchell arrived at the top of the stairs in front of the door, the woman opened the door and said that no "Kenny" lived there. Mr. Mitchell replied that just a minute earlier she had said he was there (112)\*. She started to slam the door in Mr. Mitchell's face and he put his hand up to stop the door and the woman started screaming after she succeeded in slamming the door. Mr. Mitchell walked down the stairs to the sidewalk. There, a man stopped him and asked what had happened. Mr. Mitchell showed the piece of paper and explained; meanwhile a police car arrived. The police took him upstairs and asked the woman what had happened. They searched him, took the piece of paper with the address and arrested Mr. Mitchell (22-27).

Mr. Mitchell spent 19 months in jail before trial. About a year prior to the trial, he received a letter telling him that Emanuel Molofsky was assigned to be his lawyer. A week before the trial in October, 1969, Mr. Molofsky came to the Tombs, introduced himself to Mr. Mitchell, explained that Mr. Mitchell had been transferred to the Tombs from the Queens House in preparation for trial, promised to return to see Mr. Mitchell, and left. He carried nothing with him and the meeting lasted three minutes (27029). Mr. Molofsky visited Mr. Mitchell

\* The transcript at p. 112, line 8, has been corrected. It should read,  
(footnote continued on p. 11)



once again, this time in the bull pen attached to the courtroom and told Mr. Mitchell he would be going to trial that afternoon. Mr. Mitchell protested that Mr. Molofsky had no knowledge of the case and hadn't interviewed him or his witness. In neither of the two meetings did Mr. Molofsky ask Mr. Mitchell about the events of trial; they did not discuss the case (29-30).

Once in court, Mr. Mitchell protested to the trial judge that Molofsky had not investigated the case and didn't know anything about it (31, 106), and the judge bound and gagged him.\*

During the trial, Mr. Molofsky told Mr. Mitchell that the prosecutor was offering ten years for a guilty plea. Mr. Mitchell declined the offer (31-32)

A second conversation between Mr. Mitchell and Mr. Molofsky took place at counsel table during the trial when Mr. Mitchell told Mr. Molofsky that Kenny Burrell should be produced in court to testify. Mr. Molofsky did not ask who was Burrell or his relationship to the case (32, 103). \*\* There was also a discussion during trial about a motion to dismiss the indictment (100).

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(footnote continued from p. 10)-- according to appellant's actual testimony, "Just a minute ago you said that he is here." This correction has in fact been made by the Court Reporter and the new corrected page should be substituted.

\* If Mr. Mitchell said that Molofsky was "capable; he is a lawyer," what he meant was that Molofsky may be a fine lawyer, but he wasn't doing anything for Mitchell (106-107)

\*\* Lest it be misconstrued, the first sentence at line 3 of page 83 of the minutes refers to the prior question and answer concerning the statement of Mr. Molofsky's "capabilities," made before selection of the jury. Mr. Mitchell gave an affirmative answer to the question posed at lines 6 and 7, which did not include the time element. Mr. Mitchell had testified that he told Mr. Molofsky of Burrell during trial. A similar attempt was made to confuse the witness by transferring one statement he had made with respect to dismissal of Molofsky to an entirely different motion for police reports (76-79, 108-109).



Toward the end of trial, Mr. Molofsky advised Mr. Mitchell in court not to take the witness stand. Molofsky never discussed the issue with Mitchell (105), and by that time, having been bound and gagged for protesting against his lawyer, Mitchell thought he had no choice but to decline to testify (33,37,105). Molofsky did not explain to the trial court, or to Mitchell, that since a 1967 misdemeanor conviction was the only criminal record of the defendant (96-97), cross examination about that fact should be precluded, and if not, the fact of such a conviction might not be so damaging as to keep Mitchell off the stand in a case where his own testimony was crucial (109). (See a review of Molofsky's pro forma trial motion in the trial facts section, infra.)

The attorney for respondent during colloquy at the hearing before District  
the/Court, made unsupported allegations of an underlying act and another crime (of which Mitchell was apparently acquitted in Trinidad); these unproven allegations are not evidence in this case (89-96) and, as will be argued infra, could not have been used in cross examination of appellant at trial.

Kenny Burrell is described by Mitchell as a relatively light skinned black man, a Jamaican, four inches taller than Mitchell and about 26 years old in 1969 (34). Attempts to find him and Laura Gleason, the woman at 157 Christopher Street in 1976 in New York failed (See testimony of investigator at 122).

Mr. Mitchell never saw or met, prior to their testimonies at trial, Mary Douglas and Katherine Bertram (35-36).

In the 19 months prior to trial, Mr. Mitchell was represented by the Legal Aid Society at arraignment and on adjournments, but the case was not discussed on those occasions with the various lawyers of the



Society who answered the calendar, (43-38) with the exception of the arraignment when Mr. Mitchell mentioned Kenny Burrell to a lawyer (47). Legal Aid was eventually relieved on their own motion, and Mr. Mitchell's wife attempted to hire a lawyer whom, once again, Mitchell only saw on adjourned dates and who never interviewed him and whom he eventually could not pay. (50-51) Legal Aid picked up the case again for more adjourned dates but no interviews or discussions other than,

Mr. Mitchell?

Yes, here.

Allright, we will be going on in the next half hour, and then the asking for the postponement in open court and the return to the pens (53-54). Indeed, on one occasion in July, 1968, shortly after his arrest, he was brought into the courtroom, handcuffed between two uniformed attendants and shown up to Mary Douglas and Katherine Bertram who were sitting in the audience to identify him. No lawyer was notified and no lawyer appeared on his behalf, this in a case where the entire issue was identification (113-144).

Mr. Mitchell had been a merchant seaman all his life. He had not studied law and was obviously not familiar with the intricacies of criminal procedure. During his 19 month pre-trial incarceration, however, while no lawyer was really acting on his behalf, he consulted other inmates and the prison library and attempted to write his own motions (61-62, 109-110). He attempted to get before a judge in Queens County on a pro se motion wherein he mentioned Kenny Burrell, but again to no avail. (85-87). Thus, there is evidence that Mr. Mitchell had been asserting in court and to his lawyers, when given the chance, the existence of Kenny Burrell since well before the start of his trial.

Although Mr. Mitchell could not recall specifically what he was



doing on July 8 and 9, 1968 (68-69), during that month of July, 1968 he was going to the Union Hall shape-up every day and reporting for work at Drake's bakery every night (111). Mr. Mitchell was his own witness to these facts and he and Kenny Burrell were the witnesses to the events of July 21 and 22, 1968, and both would have so testified at trial (110-111). He was not aware of other witnesses in his favor (69).

Mr. Mitchell testified further that one of the reasons Molofsky was threatened with contempt during the trial was Molofsky's refusal on Court order to take his hands out of his pockets during cross-examination (101, 104). Mr. Mitchell protested at the start of the trial that Molofsky had not ordered the minutes of the Wade hearing (87), and, in fact, Molofsky made no demand for those minutes until after the opening statement of the prosecutor and then it was a one sentence request without explanation, which the trial court overlooked. (See trial facts, infra). Having had no discussions with Molofsky about the defense and having seen no records or minutes of prior proceedings, Mitchell protested, "Your Honor, I require certain information. How can I pick a jury when I know nothing about my case?" (119-121).

#### B. The Wade Hearing and the Trial

At pre-trial and trial proceedings on October 16 and 17, 1969, appellant Mitchell repeatedly sought to explain to the trial judge the reasons for his wanting the discharge of the Court appointed Mr. Molofsky, and just as repeatedly he was told, without consideration



to appellant's reasons, that no new counsel would be assigned, and that if he persisted in attempting to explain his reasons to the Court he would be bound, gagged and straightjacketed, which he was, and in front of the jury (T. 13,26,28,30,32,37-42,51-59). Before being bound and gagged and during it, when the court permitted him to speak briefly, appellant was able to say that he required certain information and couldn't proceed with the picking of a jury until he knew about the case (T. 23), that he had certain written motions to make pro se,\* with respect to his counsel (which the Court refused to entertain) (T. 27-28), that, "He is doing nothing for me" (T. 40), that counsel knew nothing about the case and that in two brief interviews with counsel, little about the case was discussed (T. 52), and that counsel whom he didn't want should not be forced on him (T. 54). The trial Court never inquired into appellant's problems with Molofsky, simply refused to receive the pro se motions (T. 28), directed Molofsky to conduct the defense in any "manner you [Molofsky] see fit and proper" (T. 30), ordered, "Molofsky is assigned-- period" (T. 27), and, "If you open your mouth again you are going to be bound and gagged. Mr. Molofsky is a very capable and proper attorney" (T. 39), and, finally, actually bound, gagged and straightjacketed appellant in front of the jury, without one word of objection from Molofsky (T. 42).

After the prosecutor's opening statement, and after repeated pre-trial demands by appellant for the minutes of the identification hearing, Molofsky made a two sentence request for daily copy and "all minutes of the prior hearings and the opening of the jury" (T. 96). He gave no explanation for his request for the hearing minutes, and \*ie  
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\*It was in such a pro se motion to a judge in Queens that appellant did apparently mention the witness Kenny Burrell (85-87).



request was denied on the ground that the prosecutor was not requesting daily copy (97). Molofsky did not pursue the request or clarify its need until after Mary Douglas had completed her testimony and had been excused and Katherine Bertram had completed her direct. Then he cited the Rosario case for the first time, at a point in the trial where an adjournment would have been necessary to have them transcribed. The trial court, due to the lack of explanation in the original request, had treated it only as a request for daily copy. Thus, appellant was deprived of a transcription of the minutes during the trial, entirely so as to Mary Douglas, and partially so as to Katherine Bertram and Laura Gleason, by the time of whose testimony the identification hearing notes were ordered by the Court to be read orally to counsel by the reporter (222-229).

During the trial the judge was annoyed that Mr. Molofsky kept his hands in his pockets while examining witnesses and when Mr. Molofsky continued to refuse to follow the Court's directions to take them out, the Court threatened Molofsky with contempt (T. 252-258).

Essentially three witnesses testified against appellant at the trial, Mary Douglas, Katherine Bertram and Laura Gleason. Appellant was arrested on July 22, 1968 outside 157 Christopher Street, the building containing the apartment of the third woman, Laura Gleason. At the District habeas hearing before the Court, appellant testified for the first time to his version of the events at 157 Christopher Street (see supra). Laura Gleason testified at trial that the buzzer rang in her apartment at 2:00 P.M. on July 22. Although looking out her window she could normally see anyone ringing the bell who was standing only five or six inches from the door, she looked this time and saw no one (T. 359, 398).



Before the grand jury a week after the incident, Ms. Gleason testified that she thought the person ringing may have been "my boyfriend or one of my boyfriends" but at trial she denied making that statement and testified she thought the person ringing was her boyfriend Steve. She buzzed the door open (T. 387-88, 359, 409-410). A man she didn't know walked towards the stairway. She gave the following testimony at trial:

I asked him what he wanted, and he said, 'Is there a Kenny someone living here?' I don't remember the last name.

Q: He used the last name?

A: Yes.

Q: Yes?

A: And he took out a piece of little piece of white paper, and he looked at it, and he -- then he looked at me and he said something to the effect that 'I was told to look this person up if I was in New York; a seaman gave me this address to look up.'

(T. 361-362).

She told the man that she didn't think such a person lived there and backed into her apartment, after which the man burst into her apartment and assaulted her.\* She screamed and he "casually" walked away and out of the building where he was stopped by Eddie Murphy, who lived in the building (T. 362-372).

Eddie Murphy with three felony convictions, robbery with a gun, armed robbery and federal and state extortion, testified that he grabbed appellant on the street.

Q: Did the police come?

A: Yes. He tried to show me some papers of some kind... said he was a merchant seaman or something but didn't understand it because of his accent (T. 452)

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\* Appellant was convicted only of burglary in the second degree and criminal trespass with respect to this incident. The jury acquitted him of a charge of sexual abuse with respect to this incident (T. 717-718) and the District Court below voided the conviction for criminal trespass.



Mr. Molofsky asked the following question and got a negative answer:

Did he ever mention anybody -- anything, about a  
Kenny Barret to you while you were taking him back?  
(T. 475).

The arresting officer, Detective James P. Mohan, testified that  
appellant had a seaman's card on his person when he was arrested (483).  
Appellant was searched in the apartment at 157 Christopher Street.  
Molofsky asked the following question and got a negative answer:

Did you ever find a piece of paper on him with the  
name of Kenny something or other, Kenny Barret, with  
an address of 157 Christopher Street? (T. 500)

Appellant was connected to the other two women only after the  
incident at 157 Christopher Street. On July 22, 1968, Mary Douglas  
and Katherine Bertram were shown photographs and, although they each  
chose a bust photograph of appellant as the man who entered their  
apartments on July 8 and 9, 1968, these identifications were immediately,  
improperly reinforced with a single, full size photo show-up of appellant.  
Then a few days later, the two women were taken together to the  
Criminal Court in a police car where, on the way, they were told they  
were being brought to the court to identify somebody (Identification  
Hearing at 42). In the Criminal Court they were seated within view of  
each other and were told to nod when they saw their assailant brought  
into the courtroom. They did nod when the arresting officer Mohan,  
who had been to the homes of the witnesses to show them the photos,  
walked into the courtroom with appellant (Id. at 4-5, 8-9, 23, 34-35, 42).  
To even further and irrevocably reinforce the identifications, Katherine  
Bertram was shown photographs two days before the identification  
hearing (T. 116). Prior to the photo spreads of July 22, the women were  
shown mug shots, not preserved, but failed to identify anyone.



At the end of the case, Mr. Molofsky, without explaining the particulars of appellant's prior record of misdemeanor conviction, asked that appellant be permitted to take the stand without cross examination as to his record. When the motion was denied, Mr. Molofsky, for no apparent reason connected to appellant's defense, asked appellant on the record whether he had told appellant he had a right to take the stand. Appellant replied that Molofsky had told him he could take the stand. Then, Molofsky instructed appellant in court on the record,

Now, realize that if you take the stand your background is subject to cross examination, you realize all that?  
(T. 515)

Then, commanding appellant to answer for the record, Molofsky asked if appellant wanted to take the stand. Appellant said he would not take the stand, and the defense rested (T. 515-516).

At the sentence proceedings on November 26, 1969, appellant remained mute and Mr. Molofsky made the following statement:

I would also like the record to note that when I went in to speak to Mr. Mitchell and asked him to tell me something about his background in order to be helpful, and Mr. Mitchell, as you well know, remained mute at that time also... Well, I'm informing the Court of this, your Honor, and I'm asking that based on the fact I asked him what he wants -- if he wants to speak for himself-- I told him about his right to appeal... (3-4).

Appellant received a total sentence of sixteen years, eight months to fifty years on charges of robbery and burglary with respect to the three separate instances. It is this judgment of conviction that he seeks to have vacated by the instant petition.



## ARGUMENT

### POINT I

APPELLANT WAS DEPRIVED OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND A SUBSTANTIAL DEFENSE, WHEN HIS COUNSEL, ASSIGNED TO HIM OVER HIS IGNORED PROTESTS PRIOR TO TRIAL, DID NOT DISCUSS THE CASE WITH HIM, DID NOT INVESTIGATE HIS DEFENSE OR THE WITNESS IN SUPPORT THEREOF, DEROGATED THE DEFENSE IN FRONT OF THE JURY, AND ERRONEOUSLY IMPEDED HIS RIGHT TO TESTIFY

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Since the Court below found as facts that appellant's assigned counsel did not prepare appellant's case prior to trial, did not meet with him and discuss the case, did not investigate a possible witness on his behalf, and did not familiarize himself with appellant or his background, thereby misadvising him not to take the stand without basis in law or fact, and that the trial court ignored appellant's pre-trial protests of all of the above, and "failed to discharge its obligation of inquiring about the cause of Mitchell's dissatisfaction with his attorney" (slip op. p. 11 n. 8), the Court's conclusion of law should have been that appellant was deprived of the Constitutional rights to due process, effective assistance of counsel and a fair trial and that his conviction could not stand. The Court concluded, however, and erroneously, we submit, that a "substantial defense" was thereby lost on only one of the three separate crimes for which appellant was tried. As the discussion infra will show, the Court was in error because, appellant did have what the law must recognize as substantial defenses to those other two crimes. He had his own testimony that he was not involved in the other two crimes, that he was not there, that he was, during the days when these crimes occurred, reporting to his Seaman's



Union Hall for shape-up and working at Drake's Pokery at night. That this is a substantial defense and would have been had he testified at trial is supported by the District Court's own opinion below, "we found Mitchell to be a credible witness" (slip op. at p. 11). If the judge believed him on this hearing, surely the Court could not say beyond a reasonable doubt that a jury would have disbelieved him, Chapman v. California, 386 U.S. 18 (1967),

that if the case had been conscientiously prepared and faithfully presented, the judge or jury would in the end have believed the account given by the complainant and the police. This court must therefore reject the suggestion that an infirmity so basic as the one now shown may be passed over as harmless error.

United States ex rel. Thomas v. Zelker, 332, F. Supp. 595, 601 (S.D.N.Y. 1971) (Frankel, J.)

Furthermore, there was a substantial defense based on the highly suggestive and totally unnecessary police procedures used to obtain the identification of appellant as the perpetrator of the other two crimes. Both of these defenses were lost to appellant because of the same inadequacies the District Court found deprived appellant of a fair trial on the conviction it voided.

Furthermore, the State, over appellant's objection, tried him at one time for the three separate crimes, and must now take the responsibility for the prejudicial compounding of guilt which occurred when his Constitutional right to a defense was taken away from at least one of those charges. The situation is analagous in the converse to those cases where evidence is erroneously admitted but might have been relevant to only one of several charges or one of several defendants on trial; there is still a prejudicial spill-over of guilt from one charge or one defendant to the other. United States v. Branker, 395 F. 2d 881, 888 (2d Cir., 1968); United States v. Vaught, 485 F. 2d 320 (4th Cir.,



1973); United States v. Stevenson, 409 F. 2d 354 (7th Cir., 1969); United States v. Bozza, 365 F. 2d 206, 216 (2d Cir., 1966). In this case, the loss of the defense to the one charge prejudiced the defense and the possibility of acquittal on the other two charges. There is no way to say in this case beyond a reasonable doubt that had the witness Kenny Burrell been found and produced or had appellant testified with or without Burrell, that the jury, finding appellant "a credible witness," as the Court below has done, would not have acquitted him of one or both of the charges to which the Burrell testimony did not relate. This was also a reasonable possibility had only Burrell testified, since even without the testimonies of appellant and Burrell, the jury disbelieved the State's witness, Laura Gleason, and acquitted appellant of her sexual abuse. With defense evidence, even if it had been confined to the Gleason charges, the jury's belief in appellant's innocence of those charges may well have spilled over into a disbelief of the psychologically suggested identifications of the two witnesses on the other charges (see discussion infra).

In trying appellant for these three separate crimes at once, the State cannot retreat from Constitutional error of the magnitude of deprivation of effective counsel by arguing that in fact three separate trials took place. But, the State's responsibility goes further; the State assigned this inadequate counsel to appellant and then completely ignored appellant's now proven legitimate pre-trial protests.

The very cases cited by the Court for the trial judge's failure to inquire into appellant's now proved legitimate claims against his assigned trial representation (p. 11, n. 8 of the Court's opinion) hold that a conviction cannot stand under the Fifth, Sixth and Fourteenth



Amendment rights to due process of law, fair trial, and affective assistance of counsel when State action, in the person of the trial judge and in the person of an attorney assigned by the Courts, deprives a defendant of effective assistance of counsel, especially where legitimate claims against assigned counsel are ignored by the trial court. And, we submit that since State action played a substantial role in the Constitutional deprivations reaching due process proportions, the conviction must be vacated without regard to the strength of the prosecution's case.

As this court said in United States v. Morrissey, 461 F. 2d 666, 669-670 (2d Cir., 1972).

Morrissey's claims that counsel [as in this case, had not sought alibi witnesses and had not met with him prior to trial]... were sufficiently serious on their face to require the judge to make a far more searching inquiry than he did.... Without more, this failure to inquire, in our view, would constitute error sufficient for reversal of the judgment of conviction.

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The Courts cannot give with one hand an indigent defendant the right to appointed counsel and then, with the other hand, effectively take that right away by refusing to recognize the possibility that defendant's allegations of inadequate representation might prove correct after detailed inquiry.

461 F. 2d at 668-669 n. 6

Reversal was not ordered in Morrissey, however, because the appellant's claims there were ultimately adjudged groundless or were later cured. In this case, the Court has found his claims to be the fact, and the direction of Morrissey requires reversal. This Court said it again in United States v. Calabro, 467 F. 2d 973, 978 (1973),

If a court refused to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant,



or if in discovering dissatisfaction a court refuses to replace the attorney, the defendant may then claim denial of his Sixth Amendment right....

That State action in this case, where counsel was assigned by the State, deprived appellant of due process, effective assistance of counsel and a fair trial (because of the trial judge's failure of inquiry and failure to take corrective action) is a conclusion mandated by the following exposition of the "Rule of Law" with respect to State action in cases of retained counsel (where State involvement is obviously less).

To find state involvement in retained counsel's conduct which is adjudged to be less than reasonably effective yet not so grossly deficient as to render the proceedings fundamentally unfair, it must be shown that some responsible state official... who could have remedied the conduct failed in his duty to accord justice to the accused... if the trial judge... can be shown to have actually known that a particular defendant is receiving incompetent representation and takes no remedial action the state action requirement is satisfied. If they directly participate in the incompetency, it is even more so. Furthermore, if the incompetence of a retained attorney's representation is so apparent that a reasonably attentive official of the state should have been aware of and could have corrected it then again the state action requirements is satisfied...

If a retained counsel's actions do not sap the proceedings' fundamental fairness, but are challenged as less than reasonably effective in violation of the Sixth Amendment, state involvement through actual or constructive awareness of the error by the judge, prosecutor or other responsible official who could have corrected it, must be shown.

Fitzgerald v. Estelle, 503 F. 2d 1334, 1337-1338 (5th Cir., 1974).

See also Alvarez v. Wainwright, 18 Cr. L. 2141-42 (5th Cir., decided October 29, 1975).

Appellant submits that the trial court in this case participated in counsel's incompetence by refusing to recognize the legitimate claims



made by appellant with respect to it, and by his rulings throughout the trial including his permitting extensive testimony about a knife which he later struck from evidence, his ruling that appellant could be cross examined about crimes he didn't commit, and his reliance in sentence on a crime of which petitioner was acquitted, among other rulings. As Morrissey, Calabro and Fitzgerald hold, there is no necessity for a finding that the entire trial was reduced to a farce and a mockery or that a substantial defense was lost (although appellant still maintains all this to be the case here), when State action has been shown to have caused appellant the denial of effective representation.

The Court below was also in error in its construction of this Court's decision in United States ex rel. Testamark v. Vincent, 496 F. 2d 641 (2d Cir., 1974) cert. den. 421 U.S. 951 (1975). In that case, according to this Court's opinion, the defendant never asserted any defense that was lost, never suggested that witnesses were lost to him because of counsel inadequacy, and never asserted that counsel had not weighed tactics in preparation for a defense. In this case, appellant has asserted all these things, and the District Court has found most of them to be true to the extent that preparation was "totally lacking" (opinion at p. 11). Here, unlike in Testamark, "there was a total failure to prepare for [appellant's] defense." 496 F. 2d 64; at 642. Whereas in Testamark there were pre-trial meetings of substance between his attorneys and Testamark and evidence that counsel had investigated the scene of the crime, in this case the District Court found as a fact, supported by the "credible" testimony of appellant on the hearing and unrefuted by the lawyer, that counsel



made two brief visits to appellant prior to trial but did not discuss the case with him. And, because of this, the witness Kenny Burrell was lost, and the "credible" witness, petitioner himself, was lost, and the proper attack on the suggested erroneous identifications of the other witnesses was lost. This was not a case, like Testamark, where the defendant had been caught at the scene with no defense.

When this Court in Testamark held that, "the quality of legal representation cannot be abstractly measured," it did so in a case where, "there appears to be absolutely no argument to be made for the defense." 496 F. 2d at 643 (emphasis added). Thus, the Court below, while properly troubled by the Testamark standard, goes further than Testamark towards requiring that appellant, whom we have shown has some arguments to be made for the defense, practically prove his innocence before he will be granted a new trial with adequate counsel. This is the inadvertent effect of its holding, but not, we submit, the intent of Testamark. Otherwise, the Constitutional right to counsel and fair trial will apply only to those accused who can convince appellate courts after the fact of inadequate representation, that there is affirmative proof of innocence. Often an accused cannot produce such proof beyond his own testimony, and if, as in this case, he is deprived of his own testimony of innocence, due to inadequate counsel, the Courts must find he was deprived of a fair jury verdict. Even in cases where a defendant cannot take the stand, if the right to cross-examination and the presumption of innocence have any meaning, then, as in this case, once again, counsel's failure to develop a major line of inquiry into the possibility of mistaken or fabricated testimony must result in the denial of a fair trial. None of these possibilities was apparently present in Testamark. We show them in this case.



Finally, the Court below was troubled with the Testamark standard itself, and this Court has since indicated its dissatisfaction with it. United States v. Devins, Docket No. 76-1007, decided May 12, 1976. The basis for the dissatisfaction, we submit, is the inherent injustice in the State's foisting of inadequate assigned counsel upon defendants, and then placing a Constitutional imprimatur on such representation when the resultant trial record demonstrates guilt. This appears to approve of mere pro forma trials for indigent defendants who are at the mercy of the system from beginning to end. Such a rule perpetuates the injustice by encouraging a system of assignment which need not, except in the most extreme cases, be wary of the consequences of the assignment of inadequate counsel. Of course, there may be frivolous claims of inadequate counsel, but that is always the function of the courts to adjudicate, the real claim from the unreal. But, once an actual finding of inadequacy has been made, even in the "abstract," a decent respect for the most basic Constitutional right would seem to compel a new trial rather than an avoidance of the facts that counsel never actually met his client or prepared the case by resort to the extraneous standard of the strength of the prosecution.

Appellant's testimony that his assigned vounsel did not discuss the case with him prior to trial and did not investigate, locate or interview the witness who would explain appellant's innocent presence in the building at 157 Christopher Street where he was arrested and who might well have provided a motive for Laura Gleason's possibly perjurious testimony of assault there, is corroborated by the State record of the trial and uncontradicted by evidence from the State on the hearing,



and the District Court below found his allegations of counsel inadequacy to be fact.

1. Appellant testified that the day before his arrest Kenny Burrell gave him the address, 157 Christopher Street as Burrell's residence and invited petitioner there the next day to get some marijuana. Appellant said he went to that address with the piece of paper on which the address was written and that when he rang the front door bell, he was let in and he asked for Kenny Burrell.

Laura Gleason's trial testimony corroborates appellant's hearing testimony in several respects as to the existence of Kenny Burrell and the truth of appellant's version of the events. When he rang the door bell downstairs, she let him in (she says without question and appellant says after she looked out the window and he told her he was looking for Kenny Burrell). That Kenny Burrell was staying there or visiting there with Laura Gleason is an inference from the fact that Gleason let appellant in upon his ringing the bell at an hour when Burrell, who, if he was staying there, would have expected appellant to show up after the Union Hall shape up, and from the fact that before the Grand Jury, Gleason testified that, "my boyfriend or one of my boyfriends," i.e. Burrell or Steve, was visiting her at that hour and that's why she automatically rang him in (T. 387-388).

Appellant's testimony that he carried a piece of paper with Burrell's name and address and that he showed it to Gleason and asked for Kenny Burrell is also corroborated by Gleason herself. (T. 361-362). Eddie Murphy was also shown some pieces of paper by appellant (T. 452). After realizing that the man she had let into the building was not Burrell or one of her other boyfriends and not wanting to let him into the apartment for whatever reason, she started screaming when appellant



guarded himself against the door being slammed in his face. It is appellant's contention, which Burrell could have supported had he been found at the time of trial, that once the police arrived and entered her apartment with appellant, she embellished the story with a sexual attack to distract the police from the fact that marijuana was stashed there. Even without Burrell's testimony, the jury acquitted appellant of the sexual abuse of Gleason, evidencing that her testimony was suspect to the jury. With the testimony of Burrell, appellant may well have been acquitted of all charges with respect to this incident, and the jury's belief in his innocence thereof could well have spilled over to other charges based on grossly unnecessary and suggestive pre-trial identification procedures (see further discussion, infra).

2. Appellant testified that he spent 19 months in jail prior to trial while a succession of lawyers, Legal Aid, assigned and retained, entered and left the case without investigation. On at least one occasion, he mentioned Kenny Burrell to a lawyer and on one occasion to a Judge in Queens on a pro se motion. Molofsky entered the case, but, in two brief meetings a week prior to and on the day of trial, while giving appellant the impression that a discussion and an investigation would take place, never gave appellant the opportunity to tell him about Burrell. When appellant realized that the trial was actually starting and the promised investigation was not taking place, he protested to the trial Judge who bound and gagged him. Appellant finally mentioned Burrell to Molofsky during trial but Molofsky did nothing about it.

This testimony is uncontradicted. The State has produced no evidence that Molofsky investigated appellant's contentions which appellant began presenting at the time of his arraignment to his lawyer and in a pro se motion. His testimony is corroborated by the trial record which shows a desperate man attempting to get the trial



Judge to believe that Molofsky had done nothing to preserve appellant's defense. The record clearly shows that the trial Judge paid no attention to appellant's protestations, made no real inquiry of appellant or Molofsky and that Molofsky never on the record, or before District the/Court, specifically denied appellant's allegations of lack of preparation and investigation (T. 23,26,27,28,30,32,37-42,51-59). Indeed, Molofsky never even objected to appellant's being bound and gagged in front of the jury (T. 42).

Corroborative of appellant's testimony that Molofsky knew nothing about him or his side of the case prior to trial, is Molofsky's own statement on the record at sentencing that well after trial, even as his client was about to be sentenced, he knew nothing about his client's background for the purpose of making a sentence plea on his behalf. It is no wonder that appellant wouldn't talk to him at that late hour.

I would also like the record to note than when I went in to speak to Mr. Mitchell and asked him to tell me something about his background in order to be helpful, and Mr. Mitchell, as you well know, remained mute at that time also.... Well, I'm informing the Court of this, your Honor, and I'm asking that based on the fact I asked him what he wanted -- if he wants to speak for himself -- I told him about his right to appeal....

(Sentence proceedings at 34)

Here is an admission by Mr. Molofsky, who was usually careful to place on the record anything necessary to protect his own defense/of his client (see also his examination on the record of his own client concerning his advice to the client that his "background" would be exposed if he testified (T. 515-516)), that prior to this post-trial, pre-sentence conference he knew nothing about appellant's background. This time,



while Molofsky thought he was protecting himself at the expense of the client, by explaining why he was making no sentence plea on his client's behalf, he was admitting to knowing nothing about the man up to the time of sentence.

Thus, appellant's testimony is corroborated that there were no pre-trial discussions with Molofsky, that Molofsky, while promising to hold such a discussion after his first, three minute meeting with appellant, showed up on the day of trial and told appellant they would proceed. There is corroboration of appellant's testimony that once he had the opportunity to say something to Molofsky, at counsel table during trial, he told Molofsky about Kenny Burrell, but Molofsky paid no attention, asked nothing about Burrell, and made no investigation. The trial record reveals that Molofsky did indeed know by that time of Kenny Burrell, but did not pay attention to his client or credit the story or make an investigation. First, Laura Gleason testified on direct examination that appellant showed her a piece pf paper, asked for Kenny and used a last name which she did not recall (T. 361-362). Then, Molofsky asked the following question of Eddie Murphy,

Did he ever mention anybody -- anything about a  
Kenny Barret to you while you were taking him back?

(T. 475)

and of Detective Mohan,

Did you ever find a piece of paper on him with the  
name of Kenny something or other, Kenny Barret with  
an address of 157 Christopher Street?

(T. 500)

Molofsky had not paid enough attention to get the name, "Kenny Burrell" right, and, in front of the jury he indicated his own disregard for the



existence of Burrell by using the words "Kenny something or other, Kenny Barret."

It is incredible on its face that Molofsky investigated to find Kenny Burrell. If he had looked for anybody, he would have been looking for Kenny Barret, the wrong man. Had he gone to the West Indies personally, as investigation may have demanded, he would have recalled that, and he testified he did all his investigation personally. This testimony about his supposed general practice of investigating witnesses personally in each of his 6 major trials and countless misdemeanor trials every year, besides being an incredible feat for a lawyer with so many cases, is belied as to this case by the record itself.

In addition to the "Kenny Barret" references and the sentence disclaimer discussed above, the record shows that the proceedings in this case began on October 15, 1969, and ended two weeks later in a guilty verdict. Mr. Molofsky sat with appellant throughout those two weeks; the charges were very serious and the sentence was extremely harsh, 17 to 50 years in prison, yet only six years later, Mr. Molofsky has no recollection of the case or his client; he produces no file or minutes; he glances at the minutes prior to his testimony, but takes no time to read them and his recollection of a very serious case is not refreshed; he cannot deny appellant's allegations; he can offer no evidence that he met and discussed the case with appellant prior to trial or that he looked for Kenny Burrell. The truth is apparent. Appellant's testimony is credible and corroborated, and had Molofsky discussed the case with him prior to trial, there would have been no reason for appellant, who had already mentioned Burrell's name to another lawyer and to a Judge in Queens, to refuse to tell Molofsky about Burrell. Appellant was screaming at the start of this trial for



good reason. Molofsky had shown no real interest in appellant's defense; a frightening prospect for a man rejecting a plea offer, asserting innocence and going to trial on very serious charges. Sure, appellant began to then enlist the help of inmates and draw up pro se motions which were not accepted by the trial judge just as his protestations against Molofsky were not accepted or even entertained for inquiry. The Court refused to take pro se motions directed against Molofsky, wherein as in proceedings in Queens, appellant had probably mentioned Kenny Burrell (H. 85-87, T. 28).

Appellant cannot be denied relief, because he didn't specifically tell the trial Judge about Burrell. First, the trial Judge bound and gagged him when he protested about Molofsky and refused to take the pro se motions directed against Molofsky which probably contained that reference. Second, he did tell the Judge the substance of his complaint with Molofsky. Third, had appellant mentioned Kenny Burrell, the likelihood was that appellant would still have been stuck with Molofsky, a lawyer who didn't want to talk to him. Appellant did not want, and should not have been forced to trial with, a lawyer who would not do an investigation of a defense until the intervention of a trial Judge was brought to bear. Effective assistance of counsel contemplated by the Sixth Amendment should not require the waiver of the Fifth Amendment privilege not to disclose a defense. United States v. Jackson, 390 U.S. 570 (1968); Griffin v. California, 380 U.S. 609 (1965).

Thus, appellant's representation forced upon him at his trial, was insufficient, ineffectivem and deprived him of a substantial defense.

From first to last -- from the failure to confer adequately with petitioner, through the pattern of insufficient inquiry in the state courts blocking petitioner's efforts to obtain decent legal



assistance, to the total failure to do any of the work appropriate for the defense in the circumstances of this case -- petitioner's so-called representation at his trial was such as to "shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F. 2d 376, 379 (2d Cir., 1949), cert. denied 338 U.S. 950, 70 S. Ct., 478, 94 L. Ed. 586 (1950); and see cases collected in United States ex rel. Scott v. Mancusi, 429 F. 2d 104, 109 (2d Cir., 1970).

United States ex rel. Thomas v. Zelker,  
332 F. Supp. 595, 600-601 (S.D.N.Y. 1971)  
(Frankel, J.);

United States ex rel. Testamark v. Vincent, 496 F. 2d 641 (2d Cir., 1974); United States ex rel. King v. Schnubin, 522 F. 2d 527 (2d Cir., 1975); King v. Beto, 429 F. 2d 221 (5th Cir., 1970)

Although respondent argues "harmless error" in this case, Judge Frankel held in Thomas v. Zelker, supra, at 601,

Respondent is correct in asserting that the state trial record, as it stands, is powerful proof of petitioner's guilt. But the infection now discovered strikes at the heart of that record. We cannot assume that if the case had been conscientiously prepared and faithfully presented, the Judge or jury would in the end have believed the account given by the complainant and the police. This court must, therefore, reject the suggestion that an infirmity so basic as the one now shown may be passed over as harmless error.

Similarly, in the case at bar, had Burrell been found, a much more hopeful task 7 years ago when the case was tried, his testimony would have given appellant an innocent explanation for his presence in 157 Christopher Street and could have explained Laura Gleason's story of assault as a fabrication to distract the police from looking around the apartment and finding the marijuana that Burrell had invited appellant to sample there. This was certainly a "substantial defense" to the



charges involving Laura Gleason, and since the jury in fact acquitted him of the assault on Gleason, they may well have acquitted him of all charges with respect to her.

Once believing him innocent of the Gleason charges, the jury would have scrutinized the testimonies of Mary Douglas and Katherine Bertram, whose testimonies should have been attached, but were not, on the basis of mistaken identification due to improper police suggestion. The evidence at the pre-trial identification hearing presents a shocking misuse of suggestive procedures to collectively brand into the minds of Douglas and Beetram that appellant was the man. Foster v. California, 394 U.S. 440, 443 (1969). If it is true that Bertram and Douglas picked petitioner's photograph from a spread shown to them on July 22, 1968, it is also true that prior to that small spread viewing and closer in time to the crime, they viewed without making an identification, a large number of photographs, which were not preserved for the hearing and which may well have contained appellant's photo, (United States v. Fernandez, 456 F. 2d 638, 642 (2d Cir., 1972), United States v. O'Neal, 496 F. 2d 368 (6th Cir., 1974), United States v. Ash, 413 U.S. 300, 93 S. Ct. 2568-2579 (1973)) and it is also true that almost simultaneously with the small spread identification, they were shown a separate, single full length photograph of appellant (United States v. Cook, 464 F. 2d 251 (8th Cir., 1972) cert. den. 409 U.S. 1011; United States v. Daily, *infra*; Braithwaite v. Manson, 18 Cr. L. 2290 (2d Cir., decided 11/20/75)). Then, a week or so later, they were brought together to the criminal court for the purpose, so they were told, of identifying their assailant (Foster v. California, *supra*), and in the courtroom where they sat in view of each other, appellant was



shown-up to them in handcuffs in the presence of Detective Mohan who had a week earlier shown them the photographs. United States v. Johnson, 461 F. 2d 1165 (5th Cir., 1972); United States v. Luck, 447 F. 2d 1333 (6th Cir., 1971). Then on the eve of trial Bertram was shown photographs again. United States v. Dailey, *infra*. These procedures could only have had one purpose, to irrevocably implant in the minds of these two witnesses that appellant was the man to be identified in court, to erase the possibility of any doubts arising in the minds of the witnesses in the interim between the crime in July, 1968 and the trial 19 months later. It is clear the police were concerned about these doubts, evidencing a lack of confidence in their witnesses; there is no other explanation for these suggestive procedures which were unnecessary to any purpose cognizable under due process standards. See United States v. Dailey, 18 Cr. L. 2166 (8th Cir., decided 10/22/75); Allen v. Moore, 453 F. 2d 970, 974 (1st Cir., 1972) cert. den. 406 U.S. 969; Stovall v. Denno, 388 U.S. 293, 302 (1967). Had appellant's defense been, "conscientiously prepared and faithfully presented" (Thomas v. Zelker, *supra*), these arguments would have been made to the jury based on cross examination and possible expert psychological testimony concerning the facts of the suggestive identification procedures. Instead, the only defense presented was that appellant should be acquitted because, albeit without any foundation, maybe Douglas and Bertram were mistaken. The suggestive procedures used by the police gave a very real foundation for how and why they were mistaken, but the jury never knew it. The ruling of the state courts permitting the in-court identifications despite the horrendous suggestive procedures, did not, and still does not, preclude appellant from making these arguments to the jury on the credibility of those



identifications.

With an adequate defense, appellant may have been acquitted of all the Gleason related charges, and/or one or both of the Douglas and Bertram charges. If any one of these sets of charges might have been rejected, appellant is entitled to a new trial since they were all tried together and appellant's sentence was influenced by all three. And, even if it be argued that the evidence was overwhelming on the Douglas set of charges because she supposedly saw the same man a week later, the fact that these two women viewed a show-up of appellant together, after being shown his single, full length photograph, and had every opportunity to discuss and reinforce each other's identifications in the criminal court, mandates a new trial because the weaker identification (Bertram) was obviously influenced by the stronger (Douglas), as were the two sets of charges in the eyes of the same jury who heard them. The D.A. conceded this when he thought it necessary to show Bertram photographs on the eve of trial.

3. The deprivation of the witness Burrell, at least of the defense investigation which might have uncovered him, and the deprivation of a lawyer who would have presented the defense without undercutting it with references like "Kenny something or other" was enough to deprive appellant of adequate counsel and a substantial defense. But, in addition, a second witness, appellant himself, was lost to the defense, because appellant was never properly advised concerning the taking of the stand, and on erroneous advice and intimidation from counsel in open court, he thought he could not take the stand.

Appellant testified that Molofsky never discussed with him his rights and the ramifications with respect to testifying in his own behalf, but simply advised him not to testify. Appellant, by the



end of the People's case, having been bound and gagged and ordered to accept Molofsky's representation and advice, felt he had no choice but to refuse to testify. Molofsky does not deny these allegations. Respondent, however, points to an extraordinary colloquy in the trial record wherein Molofsky examines his own client on the record about matters obviously subject to the attorney-client privilege (T. 515-516). This colloquy does not refute appellant's allegation of no private attorney-client discussion, and during this on-the-record colloquy, Molofsky merely told appellant he had a right to take the stand, erroneously advised him, "if you take the stand your background is subject to cross examination," and then told appellant he had to say in open court whether or not he would take the stand. Not only is this open court attorney-client examination, conducted in open court by Mr. Molofsky for obvious reasons of his own protection, indicative of the lack of a confident attorney-client relationship, but it is evidence that appellant was given insufficient and misleading advice which kept him off the stand.

It is not true, under New York State law, or the law of any jurisdiction, for that matter, that if a defendant takes the stand, his "background" is subject to cross examination. A defendant does not put his character in issue merely by taking the stand. Michelson v. United States, 335 U.S. 469. Appellant's general background was thus not subject to cross examination in this case. He could have been cross examined about whether he had ever been convicted of a crime and in this case that rule would have restricted the prosecutor to 1967 misdemeanor conviction. The law is clear that the prosecutor could not have gone beyond the date and statutory title of any misdemeanor; he was strictly precluded from examining into the underlying



acts, and the trial Judge has no discretion to permit him to do so. People v. Jacobs, 45 A.D. 2d 675 (1st Dept., 1974), People v. Reingold, 44 A.D. 2d 191 (4th Dept., 1974), People v. Washington, 32 A.D. 2d 605 (4th Dept., 1969), People v. Thomas, 43 A.D. 2d 547 (1st Dept., 1973), People v. Moore, 20 A.D. 2d 817 (2d Dept., 1964), People v. Johnson, 31 A.D. 2d 842 (2d Dept., 1969), People v. Chestnut, 42 A.D. 2d 594 (2d Dept., 1973) (cross examination about the sentence on prior conviction proscribed).

The prosecution quite properly asked defendant whether he had been convicted of attempted armed robbery. But when it inquired into the type of instrument used in the robbery and the age and sex of the victim, it was clearly trying to serve no other purpose but to show an inclination or tendency on the part of the defendant to commit the crimes for which he was on trial.

People v. Reingold, supra at 195-196

Had appellant been so informed, indeed had Molofsky understood this to be the law, appellant may well have testified to his own innocence which could have been corroborated by Burrell.

Nor could appellant have been cross examined about the underlying acts of any misdemeanor conviction on a theory of similar acts to prove an element of the crimes on trial under People v. Molineaux, 168 N.Y. 264. The respondent has offered no evidence on this hearing and there is none, that those underlying acts, whatever their nature, a year prior to the crimes on trial, would in any way have tended to prove the identity of appellant as the assailant of Douglas and Bertram or the fact that he assaulted Laura Gleason. Molineaux does not overrule the long standing principle that a defendant may not be tried on his past record to prove current charges, and the Molineaux criteria are not established merely by a bald assertion that since a defendant was once before convicted of a similar or related crime (and once again,



no evidence of such was presented to this Court at the hearing) evidence of the underlying facts of that crime comes into evidence to prove the crime on trial. If that were so, the only purpose served would be the impermissible one, "to show an inclination or tendency on the part of defendant which might impel him to commit the crime for which he was then on trial" People v. Moore, supra. Something more than tendency or propensity must appear in the underlying acts of the prior crime, some fact of one which is so similar as to prove a fact in issue in the other. And, the preclusion of this kind of evidence is not a discretionary power invested with the trial Judge. The cases cited require the preclusion of evidence which does not come within the Molineaux exception. People v. Jackson, 50 A.D. 2d 905 (2d Dept., 1975).

Of course, none of these legal bases were presented to the trial court or to appellant by Molofsky in this case, since he only argued the one discretionary ruling the Court could make, i.e. the Court was empowered to preclude the prosecutor from asking about the fact of a prior conviction. This argument was not even fully presented because there was no discussion about why the Court should exercise its discretion. Once the court denied that preclusion, however, all the other rules discussed above would have come into play to restrict the prosecutor to the date and title of any prior misdemeanors, and appellant, and the court, should have been put on notice. Thereafter an informed choice by appellant could have been made.

Finally, Molofsky gave appellant the erroneous impression that since his "background" would be subject to cross examination, he might be questioned about an incident in Trinidad wherein a fellow seaman was killed. It is appellant's assertion that he was acquitted of all charges related to that death, and respondent did not come forth at



the hearing with evidence to the contrary. \* The prosecutor once again would have been precluded from cross examining about charges which ended in dismissal or acquittal. People v. Santiago, 15 N.Y. 2d 640 (1964). He also could not ask about charges where there was no disposition or some doubt about the disposition. People v. Luckman, 354 App. Div. 694 (2d Dept., 1938); People v. Whitmoyer, 24 A.D. 2d 611 (2d Dept., 1965); People v. McKinley, 29 A.D. 2d 749 (2d Dept., 1972).

#### CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER  
BELOW SHOULD BE REVERSED AND THE WRIT  
SHOULD ISSUE VACATING THE JUDGMENT OF  
CONVICTION AND ORDERING APPELLANT'S  
RELEASE FROM STATE CUSTODY.

Respectfully submitted,

LAWRENCE STERN  
Attorney for Appellant

11 Monroe Place  
Brooklyn, N.Y. 11201  
(212) 875-4304

- - - - -  
\* That the trial Judge used appellant's "admission" of involvement in the Trinidad incident as a sentence factor is not proof to the contrary. (p. 8). The admission of involvement in a letter to a Judge, an attestation to appellant's honesty and straightforwardness about himself, does not mean he was held criminally responsible. In fact, his involvement was adjudicated non-criminal; he was acquitted. Therefore, the Court should not have used this incident as a sentence factor. Since the only evidence of this incident is appellant's own letter to the Judge, and since in the same letter he says he was acquitted, unless the prosecutor had real evidence to the contrary, there would be no good faith basis for cross examination.



APPENDIX



73 JUL 4 1976

## PROCEEDINGS

Date Order or  
Judgment Made

- 21-76 Filed petition for Writ of Habeas Corpus.
- 21-76 Filed order granting petitioner to proceed in forma pauperis. GAGLIARDI, J.
- 22-76 Filed affidavit of Gene B. Mechanic in opposition to petitioner's application for a writ of habeas corpus.
- 2-76 Filed petitioner's brief in reply to respondents affidavit in opposition to petition for a writ of habeas corpus. *L.J.L.*
- 3-76 Filed notice of assignment of this action to Stewart, J.
- 4-76 Filed Memorandum #3672 In re: Stewart, J. Petitioner's claim in denial for failure to exhaust state remedies, his own personal claim in denial of the merits, and a hearing is required on the question of adequacy of representation. So ordered. Stewart, J. *n/a by memo*
- 6-76 Filed Respondent affidavit, and notice of motion for an order pursuant to rule 9(n) vacating the order of this court dated 1-13-76 re: 4-1-76 (and reargue)
- 6-76 Filed Respondent memorandum of law in support of above motion to reargue
- 6-76 Filed petitioner's affidavit, in opposition to respondent's motion for reargument.
- 6-76 Filed Reply memorandum in support of Respondent's motion to reargue
- 6-76 Filed MEMORANDUM OPINION # 44164 Deft's motion for reconsideration is granted our earlier holding is reaffirmed. A hearing is to be held as soon as possible. -- Stewart, J. *wn*
- 6-76 *Habeas Corpus hearing held.* *Stewart, J.*
- 6-76 Filed petitioner's memorandum of law in support of the petition for writ of habeas corpus
- 6-76 Filed Respondent memorandum in opposition to petition for writ of habeas corpus
- 6-76 *Filed transcript of record of proceedings date 4-21-76*
- 6-76 Filed writ of H/C with marshal's return on 5-19-76 writ satisfied
- 6-76 Filed CJA form #5 authorizing payment to Ralph L. Addonizio, 1355 Sullivan St. NW 10012 for expert services representing petitioner for W/H/C hearing. -- Stewart, J.
- 6-76 Filed CJA copy #2 -- Original copy #1 mailed to A.O., Wash., DC for payment.
- 6-76 Filed OPINION # 44636----- We must deny the application for a writ of habeas corpus. So ordered. Stewart J. (to prose for notices)
- 6-76 Filed petitioner's affidavit, and notice of motion for reargument of petitioner's application for w/h/c
- 6-76 Filed respondent affidavit, in opposition to petitioner's motion for reargument of his application for writ of habeas corpus
- 6-76 *Filed petitioner's affidavit and notice of motion for an order granting petitioner's cert. of probable cause to appear, on submission.*
- 6-76 Filed report of Mag: Baby In my opinion, and for reasons herein-stated, the petition in this case is without substance and should be denied without hearing.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

U.S.A. ex rel. DAVID MITCHELL,

Petitioner,

-against-

J. E. LaVALLEE, Superintendent,  
Clinton Correctional Facility,

Respondent.

73 Civ. 4999

#43720

MEMORANDUM

STEWART, DISTRICT JUDGE:

Petitioner, David Mitchell, has brought a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, seeking a plenary hearing to present proof substantiating his allegations of deprivation of his Sixth, Eighth, and Fourteenth Amendment rights.

Mitchell was convicted on November 26, 1969 in New York on charges of robbery, grand larceny, burglary, possession of a weapon, and criminal trespass. He was sentenced to a term of eight years and four months to twenty-five years, to run consecutively on the first two counts and concurrent sentences of shorter duration on the remaining counts. His conviction was affirmed without opinion by the Appellate Division, First Department on February 1, 1971 (36 A.D.2d 690); leave to appeal to the Court of Appeals of New York was denied on April 2, 1971.

FILED  
U.S. DISTRICT COURT  
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S.D. OF N.Y.

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CIVIL DOCKET  
UNITED STATES DISTRICT COURT

Stewart, J.

Jury demand

73 CIV. 4999

D. C. Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

U.S.A. ex rel., NYD, INC.

VS.

Supt. of Clinton Correctional Facility,  
J.E. LAYLON

For plaintiff:

David Mitchell #46365  
Box 3  
Dannemora, N.Y., 12929

and for hearing represented by  
Ralph L. Addonizio  
1855 Sullivan Street, NYC 10012

For defendant:

Louis J. Pefrowitz, Atty G.  
State of N.Y.  
2 World Trade Center  
N.Y.C. 10047

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	1/1/			
J.S. 6 mailed ✓	Marshal				
Basis of Action:	Docket fee				
Writ of Habeas Corpus 28 USC 2241	Witness fees				
Action arose at:	Depositions				



On July 15, 1971, Mitchell's federal habeas corpus petition was denied without a hearing. In that petition, Mitchell had alleged that errors at his arrest and at trial deprived him of his constitutional rights; included in the alleged errors were the withdrawal of a sworn juror, the lack of a line-up, the issuance of a superseding indictment, an in-court identification, and reassignment of the same counsel after Mitchell had requested that his original counsel be discharged and a new attorney be appointed.

Judge Croake, in an endorsement, concluded that the record disclosed "no error or constitutional significance was committed in the state court proceedings." After briefing and argument, the opinion was affirmed without opinion by the Court of Appeals in January of 1973 and certiorari was denied in May of 1973.

Mitchell now comes before this court, alleging that his Sixth Amendment right to counsel was violated because he had ineffective and inadequate representation by court-appointed counsel, his Eighth Amendment right to be free from cruel and unusual punishment was denied him because he was sentenced to what is, in aggregate "life imprisonment," and his Fourteenth Amendment right to due process and equal protection was denied him because of the "exercise of... 'judicial despotism', negligence, prejudicial conduct."



We must first address the question of whether petitioner has adequately exhausted his state remedies, as required under 28 U.S.C. §2254. A prisoner must "present the state courts with the same claim he urges upon the federal courts." Picard v. Conner, 404 U.S. 270 (1971), United States ex rel. Bryant v. Vincent, 373 F. Supp. 1180 (S.D.N.Y. 1974).

A review of the brief submitted on behalf of petitioner to the Appellate Division, First Department, in October of 1970 reveals that Mitchell raised due process claims<sup>1/</sup> in the state court but did not make an Eighth Amendment challenge. Further, there is no indication that Mitchell raised his Eighth Amendment claim in a motion for post-conviction relief in the New York State courts. [Criminal Procedure Law §440 et seq.].<sup>2/</sup> Thus, we dismiss his claim of cruel and unusual punishment be-

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<sup>1/</sup> While Mitchell's claim was phrased in terms of denial of due process because counsel was reassigned to him over his objections (a claim also raised in Mitchell's habeas corpus petition of 1971), Mitchell also argued in his appellate brief that he was denied the effective assistance of counsel due to the inadequate preparation of his attorney [Brief, p. 20]. Further, he argued the denial of due process because the conduct of the trial judge allegedly deprived Mitchell of a fair trial. [Brief, p. 21].

<sup>2/</sup> While a claim of excessiveness of sentence is properly heard only on appeal, People v. Spencer, 61 Misc.2d 399, 305 N.Y.S.2d 906 (Sup. Ct. Kings Co. 1969), aff'd without opinion, 326 N.Y.S.2d 981 (App. Div.2d Dept. 1971), constitutional challenges to a sentence may be brought under §440 et seq.



cause he has failed to exhaust his state remedies. We reach his Sixth and Fourteenth Amendment allegations.

It is petitioner's contention that his trial counsel "never did adequately prepare a proper defense in his failure to contact relevant material witnesses whose names were given to him, to testify on my behalf." [Petition, p. 5]. No further facts are alleged in support of this allegation.

To obtain relief on a claim of denial of assistance of counsel, a petitioner must show that "there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal." United States ex rel. Testamark v. Vincent, 496 F.2d 641 (2d Cir. 1974); cert. denied, \_\_\_ U.S. \_\_\_ (1975). (citation omitted). See also United States ex rel. King v. Schubert, slip op. at 1 (2d Cir. Sept. 2, 1975).

A review of the record of the hearing on defendant's pre-trial motions, and of the trial and sentencing do not show deprivation of assistance of counsel during the trial. Petitioner's trial attorney, Emanuel Molofsky, raised objections to the admissibility of identifications made by three state witnesses and sought unsuccessfully to have them suppressed. [Pre-trial hearing, p. 119]. At trial, Molofsky cross-examined all of the prosecution's witnesses, attempting to impeach their testimony and to argue that their identifica-



tion of Mitchell was mistaken. [See, e.g. trial transcript,<sup>3/</sup> p. 146, 172, 215, 397, 467]. Further, trial counsel sought repeatedly to have the nine count indictment severed into three trials so as to separate each of the three incidents which were the bases for Mitchell's prosecution. [Tr. 4-5, 76, 311]. Despite Molofsky's lack of success with these motions, he clearly attempted to defend the rights of his client.<sup>4/</sup> Molofsky also presented to the trial court Mitchell's desire to have new counsel assigned [Tr. 25-27], repeatedly objected to allegedly prejudicial and inflammatory statements by the prosecution [Tr. 76, 197], and argued for dismissal of the indictments at the end of the state's evidence for failure to prove a prima facie case. [Tr. 503]. Further, counsel requested and obtained inclusion in the charge to the jury that the fact that Mitchell did not take the stand in his own defense could not be used as evidence of culpability. [Tr. 691]. After Mitchell was convicted, trial counsel moved for a mistrial and to set aside the verdict as against the evidence. [Sentencing, p. 2]. In summary, Molofsky was actively engaged in the defense of his client during the course of the trial.

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<sup>1/</sup> Indicated hereafter as "Tr.".

<sup>4/</sup> Lack of success is not a conclusive factor in determining the adequacy of counsel. United States v. Robinson, 502 F.2d 894 (7th Cir. 1974).



However, petitioner has asserted that Molofsky's pre-trial preparation was inadequate and that material witnesses who should have been called in his defense at trial were not produced. If witnesses were available, Mitchell might have had a substantial defense which was not raised at trial. As the record before us does not give sufficient information as to this claim, an evidentiary hearing must be held to determine the adequacy of the defense prepared by Molofsky. 28 U.S.C. §2254(d).

Mitchell's next claim is that "judicial despotism" [Petition, p. 4] deprived him of a fair trial. Two allegations are made in support of this statement. First, Mitchell seeks to relitigate the propriety of the re-assignment of the same attorney over his objections, an issue already decided in his 1971 federal habeas petition. Judge Croake's determination is in accord with recent Second Circuit law on this question. The test set forth in United States v. Calabro, 467 F.2d 973, 978 (2d Cir. 1973), cert. denied, 410 U.S. 926 (1973), reh. denied, 411 U.S. 941 (1973), is that

"[a] defendant with assigned counsel cannot decide for no good cause on the eve or in the middle of trial that he will have another attorney represent him.... In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict..... If a court refused to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering dissatisfaction



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dicial as to taint the trial or to deprive the defendant of due process.

In summary, Mitchell's Eighth Amendment claim is denied for failure to exhaust state remedies, his due process claim is denied on the merits, and a hearing is required on the question of adequacy of representation.

SO ORDERED.

Charles E. Stewart  
United States District Judge

Dated: New York, N. Y.  
January 13, 1976.



"I am not going to change your counsel." [T., p. 53]. Mitchell protested again, arguing that Mitchell was a "foreigner" who was being "railroaded to the Penitentiary". [T., p. 53]. After being instructed that his only options were to sit quietly with Molofsky or be gagged, Mitchell stopped protesting and sat without gags for the rest of his trial.

In addition to the fact that Mitchell claimed inadequate preparation before the commencement of his trial, there is evidence from the trial proceedings that Molofsky did not have great familiarity with the details of Mitchell's case,<sup>5/</sup> and did not speak with Mitchell outside the courtroom during the course of the trial. [T., pp. 178-205]. Further, Molofsky made no opening [T. p. 94] and called no witnesses on behalf of the defense. [T. p. 522].<sup>6/</sup> At the time of sentencing, Molofsky stated that he had tried to learn "something about [Mitchell's] background" to inform the court but

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<sup>5/</sup> In our earlier opinion, we noted that Molofsky was active during the trial. We retain that view; Molofsky did cross-examine witnesses, object to testimony, seek severances of the charges, and claim prejudice from the introduction of certain items into evidence. However, we note that Molofsky's performance at trial may be attributable to familiarity with defense tactics and does not alter our finding that Molofsky knew little specifically about Mitchell's case and had not prepared adequately for it.

<sup>6/</sup> Petitioner also argues that Molofsky urged him not to take the stand based upon an inaccurate legal conclusion as to what of his past history would be admissible on cross-examination. [See pp. 24-28 of petitioner's memorandum of May 26, 1976]. However, we note that the trial judge told Molofsky that, in addition to previous criminal convictions, the judge would permit ques-  
(continued)



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
:  
UNITED STATES OF AMERICA ex rel.  
DAVID MITCHELL,

Petitioner, : 73 Civ. 4999

-against- :

J. E. LaVALLEE, Superintendent,  
Clinton Correctional Facility,

Respondent.  
----- x

APPEARANCES:

Lawrence Stern, Esq.  
Brooklyn, New York  
Attorney for Petitioner.

LOUIS J. LEFKOWITZ  
Attorney General of the State of New York  
By: JOSEPH W. HENNEBERRY,  
Asst. Attorney General  
Attorney for Respondent.

O P I N I O N

STEWART, DISTRICT JUDGE:

Petitioner, David Mitchell, alleging several constitutional deficiencies in his trial and subsequent conviction of robbery in the first degree, grand larceny in the third degree, burglary in the second degree, possession of a weapon, and criminal trespass in the first degree, seeks a writ of habeas corpus. In a memorandum decision of January 13, 1976, we dismissed Mitchell's Eighth Amendment claim for failure to exhaust state remedies, his due process claim on the merits, and ordered a



hearing on the question of whether Mitchell's assigned attorney provided ineffective assistance. We appointed Lawrence Stern, Esq.<sup>1/</sup> to represent Mitchell and a hearing was held on April 21, 1976.

In its post hearing brief, the state renewed its argument that Mitchell, who had filed a previous petition for habeas corpus relief, had not met the burden of establishing that he has not abused the writ by deliberately withholding the claim of ineffective representation in his earlier petition. See 28 U.S.C. §2244 and Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969). The state raised this issue previously in its petition for reargument; we reaffirm our conclusion that it would not be in the interests of justice to deny petitioner's application on the grounds that he had raised related claims earlier.

Mitchell's previous writ application, made without the benefit of counsel, was denied without an evidentiary hearing.<sup>2/</sup> A review of that handwritten petition reveals that Mitchell attempted to present seven alleged deficiencies, or "points of

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<sup>1/</sup> The court appreciates Mr. Stern's distinguished efforts on behalf of petitioner.

<sup>2/</sup> See Endorsement opinion of Judge Croake, United States ex rel. Mitchell v. Conboy, 71 Civ. 2324, aff'd without opinion (2d Cir. 1973), cert. denied, May 1973.



issue", which he claimed invalidated his conviction. In "point two", Mitchell protested the trial court's reappointment of the same attorney after Mitchell had discharged him for alleged negligence. Thus, we cannot find that Mitchell deliberately withheld a claim in order to bring it in a later writ if the first proved unsuccessful. Rather, it is more likely that Mitchell attempted to raise questions concerning his counsel's representation but failed to adequately bring them to the district court's attention because he inartfully coupled the counsel argument with a claim that the trial court had acted unlawfully by permitting a sworn juror to withdraw without Mitchell's consent. [See pp. 8-9 of 1971 petition]. Thus, we conclude that Mitchell did not improperly and deliberately withhold his ineffective assistance of counsel claim, that the first application does not have a res judicata effect because there was not a full presentation of the issue [Sanders v. United States, 373 U.S. 1 (1963)]<sup>3/</sup>, and that we may proceed to adjudicate the question.

We turn now to the merits of Mitchell's claim that he was denied effective assistance of counsel. As discussed in our earlier opinion, Mitchell contends that his trial counsel, Emanuel Molofsky, "never did adequately prepare a proper defense in his failure to contact relevant material witnesses

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<sup>3/</sup> See also United States ex rel. Lewis v. Henderson, 520 F.2d 896, 904 (2d Cir. 1975).



whose names were given to him, to testify on [Mitchell's] behalf." [Petition for Writ of Habeas Corpus, p. 5]. At the hearing of April 21, 1976,<sup>4/</sup> Mitchell gave the following explanation of what occurred in 1968.

Mitchell, a native of Trinidad, who worked as a merchant seaman, arrived in the United States in February of 1967. [H., p. 16]. In July of 1968, he was employed on the night shift at Drake's Bakery; during the days he went to the National Maritime Union Hall, located at 13th Street and Seventh Avenue. [H., pp. 17-18]. On July 21, 1968, he met a Jamaican friend, Kenny Burrell, and accompanied him to a local bar. [H., pp. 19-20]. Burrell told Mitchell that he had access to marijuana and suggested that Mitchell could get some from him. Burrell wrote his address, 157 Christopher Street, on a piece of paper and gave it to Mitchell. [H., pp. 20-21]. At midafternoon on the following day, July 22, 1968, Mitchell went to 157 Christopher Street and rang "three bells", as instructed [H., p. 22]. A young woman (later identified as Laura Gleason) answered, heard Mitchell request Kenny, asked Mitchell what he wanted with Kenny and told him to wait. [H., p. 23].

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<sup>4/</sup> The following abbreviations will be used to indicate the various transcripts referred to in the course of this opinion. "H" will refer to the hearing of April 21, 1976. "T" will refer to the trial transcript of October, 1969. "Wade H" will refer to the transcript of the identification hearing held on October 5, 1969. "S" will refer to the minutes of the sentencing of November 26, 1969.



Mitchell went upstairs; the woman told him that "no Kenny live here" and "proceeded to slam the door." [H., pp. 24, 67]. Mitchell "stopped" the door and then the woman began to scream.

Mitchell left the apartment building; on the street he was stopped by a man (later identified as Edward Murphy) and questioned. [H., p. 26]. Mitchell pulled out the paper with Burrell's address and began to explain. At that point, the police arrived and took Mitchell to the Gleason apartment; the police searched Mitchell, took the paper with Burrell's address, and then brought Mitchell to the precinct house, where he was charged. [H., pp. 26-27].

Since July 22, 1968, Mitchell has been incarcerated, first spending 15 months awaiting trial and then, after conviction, serving his sentence of from 16 years, 8 months to 50 years.

When first arraigned, Mitchell was represented by an attorney from the Legal Aid Society, whose name he cannot recall. [H., pp. 44, 46]. At later court appearances, Mitchell was represented by other Legal Aid attorneys. [H., pp. 47-48]. Mitchell saw these attorneys only when they appeared for court adjournments, and Mitchell did not have an opportunity to discuss the defense of his case with them. At one point, Mitchell attempted to retain a private lawyer,



Louis Berko [H., p. 56] but after Mitchell was unable to pay the fees, Legal Aid was again assigned. [H., p. 52]. Legal Aid was subsequently relieved on their own motion [H., p. 55] and then, sometime in the late fall of 1968, Mitchell received a letter informing him that Emanuel Molofsky, a private attorney compensated by the state, had been assigned to represent him. [H., p. 27].

Mitchell first met Molofsky one week before trial. [H., p. 59]. The meeting, which involved only an introduction, lasted less than 5 minutes. [H., p. 28]. Mitchell's second meeting with Molofsky occurred the day of the identification ("Wade") hearing, when there was again no opportunity to discuss the case. When Mitchell was told by Molofsky that his trial was to begin, Mitchell protested to Molofsky that Molofsky knew nothing about the case. [H., p. 30]. Nevertheless, the trial proceeded. During the trial, Mitchell had brief conversations with Molofsky; they discussed a plea bargaining offer of ten years which Mitchell refused. Mitchell also requested that Molofsky find his friend, Kenny Burrell, and get him to come and testify. [H., pp. 31-33]. Later in the trial, Molofsky, without explaining the reasons, advised Mitchell not to testify on his own behalf. [H., p. 33]. During the two weeks of the trial, all conversations between Mitchell and Molofsky occurred in the courtroom (H., p. 33);



at no time did Molofsky visit Mitchell at the Manhattan Detention Center where Mitchell was detained. [H., p. 33].

Emanuel Molofsky also testified at the habeas hearing. Molofsky stated that he was admitted to the New York bar in 1955 and had practiced before both the state and federal courts. Until May of 1975, when Molofsky became seriously ill, he did criminal trial work and had tried some 50 to 75 jury cases. Before the habeas hearing, Molofsky had reviewed Mitchell's trial minutes briefly to refresh his memory, but Molofsky had almost no present recollection of either David Mitchell or his trial. [H., p. 12]. Molofsky "believed" that he had represented Mitchell [H., p. 6] but could not recall the specifics of the charges against Mitchell (H., p. 7], whether Mitchell had given him any witnesses' names [H., p. 8], or whether Mitchell had protested about the adequacy of representation [H., p. 10]. However, Molofsky stated that it was his "general practice" to interview witnesses personally [H., p. 9], and he assumed he had done so for Mitchell's case. Molofsky did not bring any files or records of the Mitchell case to the habeas hearing.

In contrast to Molofsky's unsupported assertions that he adequately prepared for Mitchell's case as he had for all others, Mitchell's credible testimony about the lack of communication with Molofsky is supported by the trial transcript.



Before the commencement of the trial, Molofsky, speaking for Mitchell, told the trial judge, the Hon. George Postel, that Mitchell wanted Molofsky discharged. [T., p. 25]. The trial court asked no questions to find out Mitchell's reasons but stated only that Mitchell had the choice of proceeding pro se or with Molofsky. [T., pp. 25-37]. Mitchell continued to protest during the jury selection and, after repeated warnings from the court to stop interrupting, Mitchell was bound and gagged. [T., p. 42]. On the second day of jury selection, Justice Postel met with counsel and the defendant in chambers. Mitchell told him that:

"Your Honor, I have made several applications before you asking for Mr. Molofsky to be withdrawn from the--The reasons for that, is, as I have said before. I may be wrong about Mr. Molofsky, you understand. If I am wrong about him, well, that I don't know, but your Honor I would like Mr. Molofsky to be withdrawn from the case, because I feel personally that Mr. Molofsky don't know that much [sic] about the case.

Mr. Molofsky has interviewed me twice, whereas we spoke very little about the case. Mr. Molofsky has no papers pertinent to my case. I have no minutes--no nothing whereof to keep up with this proceeding." [T., p. 52].

The trial court again made no inquiry about Molofsky's preparation or the validity of Mitchell's objections. Justice Postel told Mitchell:

"...you said you don't want to waive Counsel, and you wanted the Court to give you Counsel, and the Court did give you Counsel, and you had better have him, that is all.



that Mitchell had "remained mute." [S., p. 4].

Testimony from the trial transcript also corroborates Mitchell's assertion at the habeas hearing that Mitchell wanted to offer the existence of Kenny Burrell as a justification for his appearance at 157 Christopher Street on July 22, 1968. Laura Gleason testified that Mitchell had asked her if a "Kenny" lived at that address and that Mitchell had a piece of paper in his hand. [T., pp. 361, 391, 400, 416]. Edward Murphy stated that Mitchell tried to show him a piece of paper. [T., p. 452]. The District Attorney mentioned the Kenny incident in both his opening remarks [T., p. 90] and in his summation [T., pp. 588, 593], and the court, when marshalling the evidence, described Kenny as well. [T., pp. 633, 636]. Molofsky himself mentioned Kenny in his cross-examination but never stated Kenny's name

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6/. (Continued)

tions about "any immoral, indecent or visious [sic] acts that the prosecution has knowledge of and whether or not he committed them." [T., p. 515]. Further, the decision to put a defendant on the stand involves questions of trial tactics upon which courts generally do not base conclusions of ineffective assistance of counsel. See, e.g., United States v. Carguilo, 324 F.2d 795 (2d Cir. 1963).

Whether Molofsky's advice here can be described as tactical is questionable, for there is credible testimony that Molofsky never interviewed Mitchell and thus, had little or no information upon which to make a strategical decision. [See H., pp. 105, 109, S., p. 4]. Compare United States v. Yanishetsky, 500 F.2d 1327 (2d Cir. 1974), United States ex rel. Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974), cert. denied, 417 U.S. 972 (1974), United States ex rel. Sabella v. Follette, 432 F.2d 572 (2d Cir. 1970), cert. denied, 401 U.S. 920 (1971), and United States v. Sangemino, 401 F. Supp. 903 (S.D.N.Y. 1975).



correctly.<sup>7/</sup>

In conclusion, because we found Mitchell to be a credible witness and because his assertions are supported by the trial record and are not specifically disputed by Molofsky, we conclude that Molofsky failed to prepare Mitchell's case for trial and therefore provided inadequate assistance of counsel.<sup>8/</sup>

However, a district court's review of the adequacy of representation does not stop with a finding that preparation was insufficient, or, as we believe here, totally lacking. Rather, the court must ascertain whether "there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal." United States ex rel. Testamark v. Vincent, 496 F.2d 641 (2d Cir. 1974), cert. denied, 421 U.S. 951 (1975) (emphasis in original, citations omitted).<sup>9/</sup> In order to evaluate whether

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<sup>7/</sup> Molofsky asked about a "Kenny Barret" twice. [T., pp. 475 and 500].

<sup>8/</sup> It is regrettable that the trial court failed to discharge its obligation of inquiring about the cause of Mitchell's dissatisfaction with his attorney. See United States v. Morrissey, 461 F.2d 666 (2d Cir. 1972) and Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). It is unlikely that the trial court would have found that this petitioner, who had already spent 15 months incarcerated awaiting trial, was seeking to delay the trial without good cause. Compare United States v. Calabro, 467 F.2d 973, 978 (2d Cir. 1972) cert. denied, 410 U.S. 926 (1973), rehearing denied, 411 U.S. 941 (1973).

<sup>9/</sup> An alternative statement of the standard, cited most frequently and considered by some to be more stringent, is that enunciated in United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949). "The proof of the efficiency of...assistance lies in the character of the resultant proceedings.... A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."  
(continued)



a substantial defense has been lost, the district court must look to the strength of the prosecution's case and to other information presented by the petitioner to attempt to ascertain what a more effective advocate could have presented.<sup>10/</sup> See United States ex rel. Crispin v. Mancusi, 448 F.2d 233 (2d Cir. 1971), cert. denied, 404 U.S. 967 (1971), United States v. Katz, 425 F.2d 928 (2d Cir. 1970), and United States ex rel. Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971).

Here, Mitchell was charged with several crimes relating to three separate incidents.<sup>11/</sup> The witness which he now asserts

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9/ (Continued)

See also Lunz v. Henderson, slip op. 2147, 2156 (2d Cir. February 26, 1976). The variation of standards of denial of assistance of counsel in the different circuits is discussed in McQueen v. Swenson, 498 F.2d 207, 213-218 (8th Cir. 1974) and at 43 Fordham L. Rev. 310 (1974) and 65 J. Crim. L. 302 (1974). Under the test articulated by the Third Circuit in Moore v. United States, 432 F.2d 730 (3rd Cir. 1970), a retrial of Mitchell might be required. A recent unpublished opinion of the Second Circuit, United States v. Devins, Dkt. #76-1007, suggests that this circuit might entertain arguments to "relax our strict 'mockery of justice, shock the conscience' approach to allegations of incompetence of counsel."

10/ We must frankly admit that we are troubled by such a rule, for, once a finding of inadequate counsel has been made, it must be realized that the trial transcript cannot reveal the case in a light favorable to the defendant. See, e.g., United States ex rel. Thomas v. Zelker, 332 F. Supp. 595, 601 (S.D.N.Y. 1971).

11/ The full indictment is at pp. 648-651 of the trial transcript.



could have given exculpatory testimony only had knowledge of the third incident, involving an alleged assault on Laura Gleason. Assuming that Mitchell had had adequate counsel, and that Burrell had been found, had testified on Mitchell's behalf, and had been believed by the jury, Mitchell would still have had to explain his involvement in the two robberies of July 8 and July 9. In both, Mitchell was accused of robbery in the first degree, grand larceny in the third degree, and burglary in the second degree.<sup>12/</sup> The two victims testified at both the pretrial identification hearing and at the trial and each identified Mitchell as their assailant. [Wade H., pp. 50, 68, 93; T., pp. 140, 218].<sup>13/</sup> The victims also described identifying

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<sup>12/</sup> Mitchell was also charged with possession of a dangerous weapon on July 8, 1968.

<sup>13/</sup> Mitchell claims that the identifications were made under impermissibly suggestive conditions and that, had Burrell been presented to explain the third incident, had the other two victims been properly cross-examined, and had Mitchell been properly advised and taken the stand, the jury would have concluded that the identifications were mistakes. However, after a hearing on the constitutionality of the identifications, the state court found them proper.

"The Court is satisfied beyond a reasonable doubt by clear and convincing evidence that in no wise [sic] has the Constitutional rights of the accused been violated nor would they be violated by permitting the witnesses to testify and make an in-court identification of the defendant...." [Wade H., p. 128].

Further, we note that, while the/identification procedures were not optimal, both victims spent 15-30 minutes during the daytime in close physical proximity to their assailant and both independently selected his photograph from a group of eight pictures shown to them. Thus, we do not believe that evidence presented by Burrell could have afforded Mitchell a "substantial defense" to the charges relating to the July 8th and July 9th robberies.



features of Mitchell, such as his accent, clothing, jewelry, scar, and brand of cigarettes. Mitchell's wife testified at the trial and linked those characteristics to Mitchell. [T., pp. 283-317]. In sum, the prosecution brought much evidence before the jury to connect Mitchell with the July 8th and July 9th robberies.

In contrast, Mitchell offered no testimony at the habeas hearing, which indicated that he had had a substantial defense to these charges. He stated only that he had never seen the victims before his trial [H., p. 36] and would have stated so at his trial if he had had the opportunity [H., p. 111]. Mitchell had no present recollection of the events of those days and was not aware of any witnesses who could offer testimony favorable to him. [H., pp. 68-69].

Mitchell was found guilty of all counts except the last, which had charged him with sexual abuse of Laura Gleason. [T., p. 651]. He was sentenced to two consecutive terms of 8 years, four months to 25 years for his robbery and grand larceny convictions and to concurrent, shorter terms on the other counts. [S., pp. 4-7]. As Mitchell has not shown us any substantial defenses to the first seven counts of the indictment which were thwarted because of Molofsky's inadequate



trial preparation, we must deny the application for a  
writ of habeas corpus.<sup>14/</sup>

SO ORDERED.

S/S Charles E. Stewart Jr.  
United States District Judge

Dated: New York, N.Y.  
June 23, 1976.

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14/ We void Mitchell's conviction for criminal trespass on count eight because, as to this count, the testimony of Burrell coupled with Mitchell's own testimony, would have presented a substantial defense. However, as Mitchell received a one-year sentence to run concurrently with the other counts for this conviction, its vacature does not result in a release from custody.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES ex rel :

DAVID MITCHELL, :

Petitioner :

-against- :

73 Civ. 4999

J.E. LaVALLEE, Superintendent, :  
Clinton Correctional Facility, :

Respondent. :

- - - - - x

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Petitioner, David Mitchell, has brought a motion, pursuant to Rule 9m of the General Rules of the Southern District of New York, seeking reargument of this court's decision of June 23, 1976, in which petitioner's application for a writ of habeas corpus was denied. We grant the motion for reargument; upon reconsideration, we reaffirm our decision.

As noted in our earlier opinion, we agree with petitioner that his assigned counsel inadequately prepared for trial, that Mitchell raised complaints about his counsel to the trial court, and that the trial court failed to explore the reasons for Mitchell's objections to his counsel. Mitchell argues that, because the state court failed to make



adequate inquiry about assigned counsel's preparation, the state court "participated" in the deprivation of Mitchell's rights to effective assistance of counsel and to a fair trial. [Affidavit in Support of Motion, pp. 3-4]. Because of this "state action," Mitchell asserts that a claim of deprivation of constitutional rights has been shown and that this court's reliance upon the test stated in United States ex rel. Testamark v. Vincent, 496 F.2d 641 (2d Cir. 1974), cert. denied, 421 U.S. 951 (1975) was erroneous. Mitchell contends that, as the state court did not cure its failure to make a "searching inquiry" [cf. United States v. Morrissey, 461 F.2d 666, 668-669 (2d Cir. 1972)], a writ of habeas corpus must issue. See also Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974), cert. denied, 422 U.S. 1011 (1975).

While we concur with petitioner's statement that the trial court did not discharge its obligations properly, we disagree with the legal conclusion which petitioner urges. As we interpret the governing case law, unless a petitioner shows that a substantial defense has been "blotted out" because of failure of trial counsel, a habeas corpus challenge based upon inadequate assistance of counsel must be denied. See United States ex rel. Testamark v. Vincent, supra, 496 F.2d at 643. Thus, we reaffirm our June 23rd decision.

Motion for reargument ~~granted~~. We reaffirm our earlier decision.

SO ORDERED.

Dated: New York, N.Y.  
July , 1976

United States District Judge



STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,



Affidavit  
of Service  
By Mail

On

upon attorney(s) for

1976

deponent served the within

in this action, at

the address designated by said attorney(s) for that purpose

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in -- a post office -- official depository under the exclusive care and custody of the United States Postal Service within the State of New York.



Affidavit  
of Personal  
Service

On

19

at

deponent served the within

upon

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

IRVING COHEN  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 31-0684013  
Qualified in New York County  
Commission Expires March 30, 1977

The name signed must be printed beneath

Laurence Stein  
Laurence Stein